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March 30, 1992

Ms. Donna Searcy
Secretary
Federal Communications Commission
1919 M Street N.W.
Washington, D.C. 20554

Re: Docket No. 92-13 Tariff Filing Requirements for Interstate Common Carriers

Dear Ms. Searcy:

Transmitted herewith for filing on behalf of the Telecommunications Marketing Association are an original and five copies of its initial comments in the above-captioned proceeding. If there are any questions, please communicate either with Mr. Andrew Isar, Director of Industry Relations, or with the undersigned.

Sincerely,

Mitchell F. Brecher

MFB/jr
Enclosure

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Tariff Filing Requirements for Interstate Common Carriers	)	CC Docket No. 92-13

To the Commission:

COMMENTS OF THE TELECOMMUNICATIONS MARKETING ASSOCIATION

Andrew O. Isar
Director of Industry Relations

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March 30, 1992

Before the
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Tariff Filing Requirements for Interstate Common Carriers	)	CC Docket No. 92-13
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To the Commission:

COMMENTS OF THE TELECOMMUNICATIONS MARKETING ASSOCIATION

In response to the Notice of Proposed Rulemaking issued in this proceeding[1], the Telecommunications Marketing Association ("TMA")[2], a national association of switchless, non facilities-based interexchange resale providers ("resale providers"), hereby submits its comments on behalf of its members, in support of the Commission's existing policy of forbearance from tariff regulation of non-dominant interexchange carriers[3], and states as follows:

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[1]Tariff Filing Requirements for Interstate Common Carriers, FCC 92-35, Released January 18, 1991 (Hereinafter "Notice").

[2]The Telecommunications Marketing Association ("TMA") is a national association representing the interests of switchless, non facilities-based interexchange resale providers ("resale providers") who serve their subscribers primarily over the facilities of the major facilities-based carriers, AT&T, MCI and Sprint ("underlying carriers"). Resale providers purchase transport and access services from underlying carriers at volume discounts which are passed through to subscribers. Resale providers typically perform their own billing, customer service and other value added services. TMA's represents over 50 resale providers and suppliers ranging from small emerging companies to well-established successful carriers generating nearly $1B in annual revenues.

[3]TMA specifically addresses question of the legality of the Commission's forbearance from tariff regulation, raised in the instant Notice of Proposed Rulemaking. Switchless resale providers, however, represent a unique group of service providers whose service does not easily fall into conventional definitions of common carriage. Switchless resale providers, as the name implies, resell services of true common carriers over the facilities of those carriers. Should the Commission reverse its tariffing forbearance policy and subject switchless resale providers to tariffing requirements, the Commission will create duplicative and wasteful regulatory requirements, inasmuch as the tariffs of the carriers whose services resale providers offer, would already be subject to Commission tariffing requirements.

Introduction

TMA believes that the Commission's tariff forbearance policy has served the public interest and is troubled by the the legal challenges raised regarding that policy. The legality of the Commission's forbearance policy will be based on *interpretation* of statute, rules and case law. The Commission's forbearance policy can not, however, be viewed in a legal vacuum, particularly when the Commission's policy has such obvious far reaching impact on the industry, on regulators and most importantly on the public. If the Commission or courts find this policy to be illegal, can the public interest be better served? Clearly, the Commission has broad statutory authority to interpret and to apply the provisions of the Communications Act ("Act") to meet its public interest responsibilities. TMA believes that the Commission has properly exercised its authority in distinguishing between dominant and non-dominant carriers and in forbearing from requiring non-dominant carriers to offer their domestic services pursuant to tariff.

In 1982, the Commission found its forbearance policy to be in the public interest, stating as follows;

> "The Commission found tariff filing requirements for non dominant IXCs to be harmful on the grounds that such requirements inhibit price competition, service innovation, and the ability of firms to respond quickly to market trends"[4].

A reversal of the Commission's forbearance policy, if interpreted to be illegal, will have adverse public interest effects, by creating the very "harmful" conditions that the Commission successfully prevented through forbearance. Should the forbearance policy be altered or abandoned, TMA believes that the Commission retains its broad authority to differentiate

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[4]Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorization Therefor (Second Report and Order), 91 FCC 2d 59, 65 (1982).

believes that the Commission retains its broad authority to differentiate between dominant and non-dominant carriers and that the Commission must then implement further streamlined tariff requirements for non-dominant carriers which will continue to promote price competition, service innovation and the ability of those carriers to respond quickly to market conditions while mitigating the unrealistic and uneconomic burden of conventional tariff regulation on non-dominant carriers. The ability of non-dominant carriers to continue to deliver on the promise of competition is predicated on their ability to freely compete in the market place.

The Commission's Forbearance Policy Is Legal

A central question of the legality regarding the Commission's forbearance policy focuses on the authority given to the Commission to protect the public interest, under the Act, and the potential implications established through related case law. The issue is one of statutory interpretation. There is no question that the Commission must adhere to the Act. Yet the Act gives the Commission broad authority to apply the Act's provisions in a manner which achieves the Commission's public interest responsibilities.

The purposes underlying the Act and the creation of the Commission, are set forth at Section 1 of the Act. These purposes include the availability to all the people of the United States of "a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges"[5]. All of the Act's provisions, including the common carrier provisions codified at Title II, must be interpreted and applied in light of those statutory purposes. Section 203 (a)

[5]47 USC §151 (1991) (emphasis added)

of the Act requires common carriers to file tariffs. However, Section 203(b)(2)[6] specifically gives the Commission authority to modify the requirements of Section 203. Tariff forbearance for non-dominant carriers is an appropriate modification of a Section 203 requirement. Accordingly, TMA believes that the forbearance policy at issue in this proceeding is lawful.

In the Notice, the Commission has sought comment on non-dominant carrier tariff forbearance in light of two developments which have occurred in recent years. These are the Supreme Court decision in Maislin Industries, U.S. Inc. v. Primary Steel, Inc.[7] and the Telephone Operator Consumer Services Improvement Act of 1990[8] ("TOCSIA"). TMA believes that paragraph (b)(2) of Section 203 gives the Commission legal authority to modify the paragraph (a) requirement for filing tariffs. TMA suggests that, despite the carrier tariffing implications stemming from the Maislin Decision and TOCSIA[9], the Commission's decision to forbear must be evaluated in the context of the competitive interexchange *telecommunications industry* rather than based on a decision relating to, and affecting, the transportation industry. Although some may attempt to justify the applicability of the Supreme Court's decision in Maislin to the Commission's forbearance policy, TMA believes that the legality of this policy *must* be evaluated on its own merits, least we assume that the

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[6]Sec. 203 [47 U.S.C.] (b)(2) "The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions..."

[7]110 S. Ct. 2759 (1990).

[8]47 U.S.C. §226.

[9]Passage of TOCSIA reflects Congressional recognition that the Commission's tariff forbearance policy of non-dominant carriers was lawful. Congress, therefore, deemed it necessary to legislate tariff filing requirements, through TOCSIA, for non-dominant Alternative Operator Service providers.

transportation and communications industries operate with undiscernible differences[10]. The legality of the Commission's forbearance policy is based on the explicit authority granted to the Commission by the Communications Act.

The Commission's Forbearance Policy Has Promoted Development of an Emerging Competitive Telecommunications Marketplace

Few better examples of successful implementation of government policy exist than the Commission's own forbearance policy. Tariff forbearance of non-dominant carriers has succeeded in promoting economic pricing of services, reducing costs and barriers to entry. Ultimately consumers have benefited, as the Commission intended at the policy's inception. The public interest has been served, and served consistently well over its nearly ten year history. The existence of 500 plus interexchange carriers is testament to the effectiveness of the Commission's forbearance policy. Examples abound of subscribers who now receive more economically priced services, who receive more personalized treatment and who have witnessed technological network improvements which ensure service reliability, brought about through the competitive environment the Commission has helped to foster. Clearly, the policy has worked.

A reversal of the policy, without alternatives, would quickly erode the benefits the policy helped create. The availability of competitive services stands to decrease as smaller carriers and potential new entrants will reconsider the desirability of remaining in or entering the industry due

[10]See, e.g., General Telephone Co. of the Southwest, Inc. v. FCC, 449 F. 2d 846, 856 (5th (Cir. 1971), "We are unwilling to restrict the Federal Communications Commission to a course of action which has been dictated by the requirements of the transportation field."

to the applicability and associated costs of conventional regulatory requirements. Already, the Section 214 international service filing requirements can cost in upwards of $2,500.00 between preparation and filing fees. Simple tariff revisions can easily cost $700.00 or more between preparation and filing fees. For a small company, these costs do not include the expense of time diverted away from performing functions which directly contribute to the company's revenues. Additional Commission resources would be required to further regulate non-dominant carriers. In addition to the requirements for more staff, space and administrative resources needed to process routine filings, the Commission could further expect additional resources to be required in those instances where non-dominant carrier tariff filings were contested by competitors as a means to delay new offerings or price innovation. It is simply unreasonable to require the companies, or tax payers, to pay for the additional resources necessary to effectively regulate small, non-dominant carriers, if 500 plus carriers were required to file tariffs.

Tariff Forbearance -- Premised on the Absence of Market Power of Non-Dominant Carriers -- Should not be Extended to Dominant Carriers

Alternatively, greater regulatory flexibility for the dominant carrier would create just as negative an effect as reregulation of non-dominant carriers, particularly for those who depend on AT&T's network services. The ability of AT&T to change its rates at will, and without regulatory scrutiny, could cause the demise of hundreds of companies whose businesses depend on availability of AT&T's services at just and reasonable non-discriminatory rates. Already, TMA has witnessed numerous efforts by the dominant carrier to "write out" its competition from its tariffs. For example, AT&T's recent request for emergency

discontinuance of its Tariff 12, Option 58, a service that many resale providers found desirable, was an attempt to cut off potential resale of this option as quickly and quietly as possible. Examples of efforts to modify Software Defined Network services with the effect of making those AT&T services less desirable to resale subscribers, also abound. Resale of AT&T services or facilities is not limited to resale providers. As a result of its retained 65% market share[11] AT&T continues to be able to exercise market power and must remain subject to effective oversight. Neither alternative approach to tariff forbearance for non-dominant carriers offers an improvement for better serving the public interest.

The Commission Has the Authority to Differentiate Between Dominant and Non-Dominant Carriers, and Must Continue to Exercise This Authority in Regulating the Industry

Traditional tariff regulation of small, non-dominant carriers, serves no public policy benefit. Small carriers, particularly resale providers, do not possess power and are therefore unable to influence prices or manipulate the market other than to provide a subtle competitive pressure on larger carriers to keep their rates more cost based. Switchless resale providers obtain volume discounts from their underlying carriers, primarily the major facilities-based carriers, which are passed on to the resale provider's subscribers. The premise underlying tariff forbearance was that carriers without market power and which operate only in competitive markets could not rationally charge rates that were significantly above or below the market place rate, and that were therefore not just and reasonable.[12] Thus, there is no public benefit in regulating

[11]FCC Staff report, Long Distance Market Shares: Fourth Quarter, 1991

[12]Policy and Rules Concerning the Rates for Competitive Common Carrier Service Offerings and Facilities Authorizations Therefor (Notice of Inquiry and Proposed Rulemaking), 77 FCC 2d 308,316-317 (1979).

those carriers' rates in the same manner as the Commission regulates the rates of dominant carriers. Regulation of smaller carriers would be costly and duplicative.

There is no question that the Commission has the authority to differentiate between carriers in its regulation[13]. Should the Commission feel compelled to alter its forbearance policy, TMA strongly encourages the Commission to further streamline its tariff regulatory approach for small carriers, for example those carriers with less than $100M in annual revenues who are not required to report annual revenues to the FCC[14]. Such further streamlining will come as close as possible to upholding the policy goals of the current forbearance policy, e.g promoting price competition, service innovation and quick response to market trends.

Streamlined tariff regulation could require the filing of informational price lists with the Common Carrier Bureau Tariff Division that contained price ceilings under which the company could rapidly change its rates in response to market conditions, without further filings. Only if a carrier were to offer services at rates higher than those filed would it have to file a revised price list. Such filings would relieve the Commission for formal processing of the filings. These filings would be presumed lawful. TMA further proposes that the existing $490.00 filing fee be waived or reduced.

TMA does not, however, suggest changes regarding the existing requirements for the dominant carrier. The tremendous influence AT&T continues to maintain over the market, coupled with examples of its

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[13]See,e.g. MCI Telecommunications Corporation v. FCC, 765 F. 2d 1186, 1196 (D.C. (Cir 1985) "...the Commission could further streamline the regulation of non-dominant carriers without encountering any contrary Congressional prescription."

[14]Section 43.21 of the Commission Rules, 47 CFR § 43.21.

efforts to curb resale of its tariffed products create great concern to TMA. Under the existing regulatory process, those taking issue with AT&T's tariff revisions may still voice their oppositions or concerns in an effort to seek resolution of those concerns. The loss of this necessary forum could mean the end of economic resale of AT&T services and possibly those of others, as the only remaining alternative would be to negotiate with the company itself *after the fact*; really no alternative at all. No additional flexibility is warranted by the dominant carrier so long as it maintains its hold over the interexchange telecommunications industry.

Conclusion

TMA believes that the Commission has appropriately interpreted and exercised its legal authority to forbear from requiring non-dominant carriers to file tariffs under the Communications Act. A contrary finding would constitute a change of legal *interpretation* which would act to eradicate the gains achieved through the Commission's forbearance policy of stimulating competition and innovation in the interexchange telecommunications industry. A reversal of the Commission's forbearance policy would not serve the public interest and would impede the ability of smaller carriers and service providers to effectively compete by subjecting them to requirements never intended to be applicable to an entirely new and unique resale industry.

Should the Commission's forbearance policy be interpreted to be illegal, TMA proposes a streamlined regulatory process that imposes minimal tariff filing requirements containing maximum rates under which small carriers may freely operate. TMA further supports waiver or reduction of associated filing fees. However, continued tariff regulation of dominant carriers is imperative. The amount of market power and control

exerted by such carriers is too great for these carriers to be released from existing tariff requirements, lest we return to the days of an industry oligopoly, a situation clearly in opposition to the Commission's own pro competitive policies and the public interest.

If the Commission's forbearance policy is interpreted to be illegal, then work must begin immediately to formulate a legal basis for clearly giving the Commission the flexibility it needs, or the Commission should further streamline tariffing procedures for non-dominant carriers, to appropriately regulate a dynamic market place that now far out paces the ability of the law or full scale regulation to keep up.

Respectfully Submitted,

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